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No. 56

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAM FOX PUBLISHING COMPANY, INC., ET AL.,
APPELLANTS

v.

UNITED STATES AND AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court rendered no opinion in denying the appellants' motion for leave to intervene.

JURISDICTION

The order of the district court denying the appellants' motion to intervene was entered on November 16, 1959 (R. 489). The notice of appeal from that order was filed on January 14, 1960 (R. 714–717). On May 23, 1960, this Court postponed further consideration of its jurisdiction to hear this appeal to the hearing on the merits (R. 719). The jurisdiction

of this Court is invoked under Section 2 of the Expediting Act, 15 U.S.C. 29.

STATUTES AND RULES INVOLVED

The Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, *et seq.*, provides in pertinent part as follows:

> SEC. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C. 15]
>
> SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 4A, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 4A [15 U.S.C. 16]
>
> * * * * *
>
> SEC. 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United

States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: * * * [15 U.S.C. 26]

Section 2 of the Expediting Act, 15 U.S.C. 29, provides as follows:

In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

Rule 24 of the Federal Rules of Civil Procedure provides as follows:

(a) *Intervention of Right.*

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the con-

trol or disposition of the court or an officer thereof.

(b) *Permissive Intervention.*

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.*

A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

QUESTIONS PRESENTED

1. Whether an order denying intervention as of right in a government antitrust suit is appealable under Section 2 of the Expediting Act.

2. Whether the appellants, three members of an unincorporated association which is the defendant in a government antitrust suit, were properly denied leave to intervene in proceedings for the consent modification of an earlier consent judgment, where such intervention was sought as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure on the ground that the government, in negotiating the consent modification, inadequately represented the public interest.

STATEMENT

This is an appeal by three music publisher members of the American Society of Composers, Authors and Publishers ("ASCAP" or "Society") from an order of the district court for the Southern District of New York denying their motion to intervene in a proceeding in which a government antitrust consent decree was modified on consent.[1] The antitrust decree was entered in a suit brought by the United States against ASCAP in 1941 charging it with violating § 1 of the Sherman Act (R. 8–26).[2] The appel-

[1] A fourth publisher, Movietone Music Corporation, which joined in the motion to intervene below and in the appeal to this Court, was dismissed as a party on stipulation (R. 719–720).

[2] The suit named as defendants ASCAP, its president, its secretary, and its treasurer (R. 8). The individual defendants were "sued as representing all members of the Society," since the latter "constitute a group so numerous that it would be impractical to bring all of them on before the Court by name" (R. 9).

lants have appealed only from the order denying leave to intervene and not from the final order approving the modification of the judgment.

Description of ASCAP.—ASCAP is an unincorporated association and its members are authors, composers and publishers of musical compositions. They assign to ASCAP a non-exclusive right to license the public performance of their copyrighted works, and it distributes among its members the fees or royalties collected for such licensing. As of the time of the hearing in the district court, ASCAP had approximately 6,400 members, of whom 1,100 were music publishers and 5,300 were authors and composers (collectively referred to as "writers") (R. 305).

ASCAP had been formed in 1914 by the leading composers, authors (of song lyrics) and music publishers of the day in a joint effort to insure that the three interrelated groups received payment when their copyrighted compositions were performed for profit. "ASCAP exists because no individual writer or publisher is large enough to be able to grant licenses to the thousands of commercial music users throughout the country and then enforce such licenses" (R. 139). At the same time, "ASCAP's members are competitors and the Society's manner of making distribution of its revenues to them vitally affects their ability to compete with each other" (R. 125).

Collecting the payments required the establishment of an organization equipped to search out the theatres, restaurants and other organizations regularly engaged in using music for profit, and requir-

ing them (and subsequently the motion picture and radio and television industries), on threat of infringement actions, to enter into royalty agreements. These agreements usually took the form of blanket licenses permitting the use, for a fixed fee, of all of the compositions in the ASCAP catalogue. These fees were in turn distributed equally between the publishers and the writers. The Society's operations, with respect to both its external relations with users of its members' music and the relation of the members among themselves, including the distribution of the money received from ASCAP's licensees among the individual writers and publishers, were conducted by a self-perpetuating Board of Directors which elected its own successors. The Board consisted of twelve representatives of the publishers and twelve representatives of the writers (six of the latter represented the authors, and six the composers). The individual members had no vote in the election of the Board (R. 9). But the distribution of revenues to the ASCAP members was made by the Board on the basis of largely subjective determinations of the importance of the particular member and his works (R. 126).

The antitrust suit and the 1941 consent judgment.— By 1941, when the government's suit was filed, ASCAP controlled more than 75% of all copyrighted musical material used for public entertainment purposes, including the works of virtually all of the leading song writers. This power, the complaint alleged (R. 15–23), was being utilized to restrain trade in a number of respects, including refusals to deal with prospective licensees except on the basis

of a general license covering all ASCAP musical compositions, insistence upon contracts with radio stations providing for royalties determined in part upon a fixed percentage of the station's net advertising revenues, discrimination in the payments required of users similarly situated, and discrimination against the use of non-ASCAP music while at the same time arbitrarily restricting entry into the Society. The prayer for relief (R. 24–26) sought to prohibit ASCAP from engaging in these various restrictive practices in its dealings with its licensees. It also asked (R. 26) that ASCAP be prohibited (1) from electing its board of directors other than by a vote of all members for their respective representatives; (2) from distributing the royalties received to its members except in a "fair and non-discriminatory manner" based on the "number, nature, character and prestige" of the members' compositions, their length of time in the ASCAP catalogue, and the "popularity and vogue of such works"; and (3) from requiring, as a condition of writer membership, the "regular publication" of more than one composition by a person "who regularly practices [in] the profession".

The suit was terminated by a consent judgment entered on March 4, 1941 (R. 27–35). It regulated and restricted ASCAP's licensing activities, and also three aspects of its internal operations—distribution of receipts among members, voting for ASCAP's board of directors, and eligibility for membership. These latter three provisions (R. 32–33) were taken directly from the prayer for relief, *supra*. In addi-

tion, there was added to the section relating to voting the requirement that "[d]ue weight may be given to the classification of the member within the Society in determining the number of votes each member may cast * * *" (R. 32).

The 1950 judgment.—On March 14, 1950, an Amended Final Judgment, which "supersede[d]" the 1941 judgment (R. 48), was entered by consent of the parties and without adjudication of any issue of law or fact (R. 35–48).[3] Like the previous judgment, most of the 1950 decree dealt with ASCAP's licensing activities.

Changes were also made in the provisions of the 1941 judgment that governed the rights of members upon withdrawal from ASCAP, the distribution of ASCAP revenues among the members, the voting rights of members, and eligibility for membership (Sections IV–G, XI, XIII, XV, R. 38, 44–46). The most significant changes made in these provisions were that (1) ASCAP was required to distribute its revenues to its members "on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances * * * periodically made by or for ASCAP" (R. 44); (2) the ASCAP board "as far as practicable [was to] give representation to writer members and publisher members with different participations in ASCAP's revenue distributions" (R. 45); and (3)

[3] The provisions of the judgment applied to ASCAP, its officers, directors and agents, "and to all other persons, including members, acting or claiming to act under, through or for such defendant" (R. 37).

the general basis for classifying members for voting and distribution purposes was to be reduced to writing, with an appeal to an impartial arbiter or panel from any final ASCAP classification determination (*ibid.*).

The decree contained the usual reservation-of-jurisdiction clause, which permitted "any of the parties" to apply to the court for its construction, modification, or enforcement (R. 47). In addition, the United States was specifically authorized, at any time after five years from entry of the judgment, to apply for its "vacation * * * or its modification in any respect, including the dissolution of ASCAP" (*ibid.*)

The 1960 amendments.—In 1956, as a result of complaints received from ASCAP members, the government instituted an investigation of ASCAP's operations under the 1950 judgment (R. 119). This investigation indicated "that in order to achieve the purpose of protecting the competitive opportunities of the members it would be necessary to spell out more specifically how the judgment should be carried out and in part to secure some supplementary relief implementing the 1950 judgment" (R. 304), and that "in at least six aspects the Judgment required more specific directives by the Court if the antitrust purpose of the government's suit were to be achieved" (R. 119). In 1958, the government began negotiations with ASCAP looking toward changes in the 1950 judgment. After 30 to 40 conferences (R. 305, 346, 584), the parties agreed upon various proposed amendments, which they then presented to the district court for approval (R. 62–63, 305).

In a supporting memorandum submitted to the district court (R. 119–146), the government set forth the six respects in which it had determined that the 1950 judgment was deficient,[24] and explained how the proposed amendment corrected the deficiencies "so as to carry out the antitrust purpose of this suit" (R. 119).

1. Although the 1950 decree gave ASCAP members the right to withdraw from the Society, this right was made "economically unfeasible" by regulations depriving withdrawing writers of 50 percent and withdrawing publishers of 45 percent of the credits due under existing licenses and of all revenues from future licenses. The 1960 amendment permits withdrawing members to leave works in the ASCAP catalogue and to be paid in full for their performance where ASCAP continues to license the composition (R. 120–121, 668).

2. Under the 1950 decree, ASCAP's survey of performances (which governed the distribution of revenues among the members), although based in part on a sampling technique, was neither scientific nor objective. The primary fault lay in the fact that undue weight was given to network performances which were completely and accurately canvassed; too little weight was given to performances on local radio and television stations, which were spot-checked in an inadequate and unscientific manner; and no weight at all was given to performances in such other media as bars, restaurants, night clubs and skating rinks, which accounted for more than 11 percent of ASCAP revenues. The result was that two-thirds of ASCAP's revenue distribution was based upon network performances

[24] ASCAP, of course, did not concede those deficiencies (see R. 71, 663).

accounting for only one-fourth of its income, and that one-third of its revenue distribution was based upon local radio and television performances that contributed three-fifths of its domestic income (R. 121–122).

The 1960 amendments corrected the inequitable distribution of revenues by requiring that the survey of performances be based on scientific principles, developed by an independent consulting firm * with the advice of the Bureau of the Census. Under these principles, network and local radio and television performances would each be given the same percentage weight in the survey as the income from the source; and the sampling techniques for securing information as to local station performances would be put on a scientific basis, with a larger sampling of the performances of individual stations and the maximum use of station logs to supplement the tape recordings of the station's broadcasts. In addition, an experimental survey of performances in night clubs and dance halls and on wired music systems was to be instituted (R. 124).

It was specifically provided that the survey was to be subject to review upon motion of the government after an 18-month trial period, and that the court was to appoint a qualified person not connected with ASCAP periodically to examine and evaluate the working of the new system (R. 121–125, 668–670). (In accordance with the latter provision, the court appointed former Senator Ives and former New York State Supreme Court Justice McGeehan periodically to examine the design and conduct of the survey, to

* The firm was Joel Dean Associates, headed by Professor Dean of the Columbia University Business School (R. 154, 194, 346).

"make estimates of the accuracy of the samples," and to report to the court and to the parties (R. 661–662). (But see fn. 21, p. 53, *infra*.)

3. Under the provisions of the 1950 decree requiring ASCAP to give "primary consideration to the performance of the compositions" of its members in distributing revenues (R. 44), a complex distribution system had grown up for "weighting" the raw performance statistics on the basis of such factors as what use was made of the music, the performance record of the member in preceding years, and his length of time in ASCAP, in order to determine the revenue distribution to the individual ASCAP members. The government concluded that this system unduly discriminated against the newer and more active writers and publishers, in favor of members with longer tenure in the Society. Thus, the writers' distribution formula was based on a division of the proceeds to be distributed into four funds, only one of which (responsible for 20 percent of the total distribution) was based upon current performances; the remaining three funds were based on either performances over an extended period of time or on seniority as an ASCAP member.[8] The publisher distribution

[8] A Sustained Performance Fund (30 percent) was based upon the average number of performance credits of a writer for a five or ten year period, at his option. An Availability Fund (also 30 percent) had the same basic design as the Sustained Performance Fund, but additionally contained a series of "brakes" to prevent any early drop in classification regardless of the level of the member's continuing productivity. Finally, an Accumulated Earnings Fund (20 percent) was determined by multiplying the five-year average of these two previous funds by the length of time a writer has been a member of ASCAP.

was similar, although here current performance accounted for 55 percent of the distributed revenue (R. 125–131, 133–134).[6] In addition, a procedure had been established for weighting performance credits when compositions were used for non-feature purposes, such as advertising jingles or theme or background music, under which ASCAP classification committees could discriminate in the credits accorded performances of different tunes with similar uses, to a degree approaching in some instances a ratio of 1000-to-1 (R. 136–138). That is, 1000 times as much credit might be given for one tune used for background purposes as for another.[7] The "over-all effect" of this

[6] Of the remaining 45 percent, 30 percent went into an Availability Fund, reflecting a five-year accumulation of performance credits on compositions first performed more than two years previously, and 15 percent into a Seniority Fund computed by multiplying a publisher's performance credits for a five-year period by the length of time it has been an ASCAP member.

[7] The basic weighting problem arises from the fact that a high percentage of musical performances stems from the use of music, often on a continuing or repeated basis, for these subsidiary purposes. If these uses are given full value in computing performance credits, they will account for a percentage of the distributed ASCAP revenues far out of proportion to their actual worth in "selling" the ASCAP catalogue to prospective licensees. Thus, in 1958, twelve songs used as background and theme music on network programs earned more performance credits, on an unweighted basis, than the entire catalogue of Irving Berlin or Oscar Hammerstein (R. 137). On the other hand, performances of serious or lengthy musical works must be given extra credits if their composers or publishers are to receive any significant remuneration. A further problem, which directly involves the controversy in this case, relates to the type of composition used for non-feature purposes. It has been felt that the established works in the

distribution system was that more than 80 percent of all monies distributed to writers, and more than 45 percent of all monies distributed to publishers, were being "distributed on a basis which does not give primary consideration to performances as contemplated by Section XI of the 1950 Judgment" (R. 135).

Under the amended decree, a number of significant steps were taken to remedy this competitive imbalance. Most important, both writers and publishers were given an option to receive distribution of their money on the basis of current performance alone.[8] For those not choosing this option, the multiple fund distribution systems existing under the 1950 decree were to continue in a modified form giving less emphasis to seniority or past performance and more to current performance.[9] Moreover, the rules for

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ASCAP catalog should be given greater credit when utilized as theme or background material than other more ephemeral works which are not immediately recognizable by the average listener. But the extent of extra credit and the definition of an established work worthy of extra credit have involved considerable controversy.

[8] Writers were permitted to use current performance up to a certain number of credits in any year; the remaining credits were to be compensated upon the multiple fund distribution system (R. 682). The maximum percentage of the publishers' income that they could obtain from current performance alone was to increase over a six-year period from 75 to 100 percent (R. 673).

[9] In the case of the writers, the four funds were to continue but the Sustained Performance Fund (renamed the Average Performance Fund) no longer has the option of being calculated on a ten-year instead of a five-year period, and the "brakes" that limit the step-by-step rise and fall

weighting non-feature performances were set forth in detail, the degree to which different values could be given to different tunes used similarly was severely restricted,[10] and the provisions for determining what songs could be given extra value were clearly enunciated. The change in the ASCAP revenue distribution system was subsequently described by the district court as "the most significant change in the consent judgment" (R. 664).

4. The government believed that, "One of the antitrust objects of this suit, as expressed in Section XIII of the 1950 Judgment [R. 45] is to 'insure a democratic administration of the affairs of ASCAP * * *'" (R. 139). "Since ASCAP's members are in competition with each other, it was one of the antitrust purposes of this suit to make

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in classification have been severely limited. For the Availability Fund there was substituted a Recognized Works Fund, similar to the Average Fund but limited to works with a one-year history of performances (R. 680–682). In the case of publishers, the Current Performance Fund would increase from 55 percent to 70 percent while the Seniority Fund (changed in name to Membership Continuity Fund) is being gradually eliminated over a five-year period. The former Availability Fund is replaced by a Recognized Works Fund, in which songs at least one year old would receive credit for the preceding year's performances, as contrasted with the previous system where credit was given for five years of performances of songs two years old (R. 684–686).

[10] Instead of weighting ratios of as much as 1000-to-1 for recognized compositions as against less favored tunes, a limit of 10-to-1 was imposed for most compositions, with a top limit of 100-to-1. This latter ratio applies in the case of certain background music which has not been commercially published or recorded for public sale and has not received five feature performance credits in the ASCAP survey of local radio performances over a five-year period (R. 691).

it impossible for certain members to use the Society to obtain an unfair advantage over their competitors" (R. 139–140). The ASCAP voting rules under the 1950 decree "frustrate[d] this express purpose" by weighting the votes of its members so that those who received the greatest share of its revenues also had the largest number of votes, and could thus select the directors who, in turn, determined the basis for distribution of the revenues (R. 140–141). ASCAP had given each writer member one vote for every $20 of ASCAP income, and each publisher member one vote for every $500 of ASCAP income (R. 141). Under this system, less than five percent of the writers, and less than one percent of the publishers, could together elect the entire Board of Directors (R. 141).

The 1960 amendments made numerous changes in the voting system. The principal ones were: (1) votes were to be weighted on the basis of current performance credits instead of income distribution; (2) the number of votes of any one member was limited and a graduated scale of performance credits for allocating votes was established, under which members with a large number of such credits would need more credits per vote than members with a smaller number of credits; (3) the top ten publishing firms and their affiliates were collectively limited to 40.7 percent of the total publisher votes; and (4) any person sponsored by writer or publisher members having one-twelfth of the writer or publisher votes automatically became a member of the Board. (R. 674–676). (At the last election, two

members of the Board were selected by this method (App. Br., n. 30, p. 48).)

5. The 1950 judgment provided for appeal by any member from his classification (based, in part, on the number of performance credits awarded him, and on which his share of ASCAP revenues is determined) "to an impartial arbiter or panel" (R. 45; see R. 142). The government concluded that ASCAP's "grievance machinery" did not accomplish the purpose of the 1950 judgment of insuring ASCAP members equality of treatment and an adequate opportunity to protect their rights within ASCAP. The 1960 amendments established a better procedure to enable ASCAP members to secure information as to the basis of their classification; simplified ASCAP's internal appellate and grievance procedures; gave members the right to challenge before a special grievance board any alleged violation or misconstruction of the revenue distribution formula; and provided an appeal from the decision of such board to an impartial panel of the American Arbitration Association (R. 676–678).

6. The 1950 judgment required ASCAP to admit to membership all writers or publishers who met certain requirements (R. 46). ASCAP, however, "at times refused to admit applicants despite the fact that they clearly were qualified for admission to membership under the provisions of Section XV of the 1950 Judgment" (R. 145). The 1960 amendments provided detailed provisions designed to insure that qualified applicants were not denied admission, and directed ASCAP to grant membership retroactively to any

qualified applicant previously denied admission (R. 146, 678–679).

The proceedings before the district court.—On June 29, 1959, the government and ASCAP presented the proposed amendments to District Judge Ryan, who had been handling matters under the 1950 judgment (R. 62–74). The court set the matter for hearing on October 19, 1959, and issued an order to show cause returnable on that date (R. 75–76). The order provided that any person having an interest in the proceeding might then appear and make application to be heard in opposition to the proposed amendment; and it directed ASCAP to mail to each of its members a copy of the court's order, of the 1950 judgment, and of the proposed amendment (*ibid.*). The court stated (R. 65) that the "sole purpose" of the hearing was for "determining that the public interest will be best served by the modifications proposed and that it will * * * also serve to accomplish the ends sought to be accomplished by the original suit as it was filed." [11]

ASCAP mailed to its members the foregoing documents (R. 76–79) and an analysis by its counsel of the proposed judgment changes, which was filed with the court (R. 80–97). It also held membership meetings in Los Angeles and New York at which its counsel explained and discussed the proposed changes.

[11] Ten days previously, the parties had informally discussed with Judge Ryan the procedure to be followed (R. 49–61). At that time, the judge had stated that he had "a duty, independent of that of the Antitrust Division, a duty to see that the purpose of the statute is carried out in the proposed decree" (R. 60).

A copy of counsel's remarks at these meetings was mailed to the members and also filed with the court (R. 149–230, 351–352).

On October 13, 1959, the appellants moved to intervene in the proceedings, both as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure and on a permissible basis under Rule 24(b)(2) (R. 251). The grounds of the motion were that the proposed decree was inadequate to achieve the purposes of the antitrust suit insofar as it dealt with the required new survey of performances and the weighting of ASCAP members' votes (R. 254–255, 256), and that the new weighting rules and formulae prescribed for determining the amount of credit to be given to a particular performance were unfair (R. 255). This motion was rejected by the district court at the outset of the hearing on October 19, 1959 (R. 295), and a formal order denying the motion "in all respects" was entered on November 16, 1959 (R. 489–490). This order stated as the reasons for the court's action (*ibid.*)

> * * * that representation of the public and the applicants by the Department of Justice was adequate and in the public interest; that applicants are members of and are represented by the Society with their consent; that applicants have permitted this cause in which they are not named as parties to proceed to judgment: and that it would not promote the interests of the administration of justice to permit the requested intervention * * *.

A renewed motion was rejected for similar reasons on January 7, 1960 (R. 576).

At the hearing on October 19 and 20, 1959, Judge Ryan not only heard counsel for the parties (the United States and ASCAP), but also heard as *amici* all of the eleven other persons who asked for a hearing (R. 351–452, 474–488), four of whom submitted memoranda (R. 294, 297, 299, 251). Counsel for the present appellants was heard at great length (R. 295–296, 365–408, 481–484) and submitted two extensive memoranda (R. 251, 370–371).[12] In his written and oral presentation, counsel for the appellants argued in detail each of the propositions now relied upon to show the inadequacy of the decree and, thus, the alleged inadequacy of the government's representations of their interest in the effective enforcement of the antitrust laws and the protection of the weaker ASCAP members.[13] Counsel for the appellants conceded that the proposed amendment, in the four respects which he criticized, constituted an improvement over the 1950 judgment (R. 374, 379, 386, 397, 403–404).

At the conclusion of the two-day hearing, the district court stated its view that "although this pro-

[12] These memoranda do not appear in the printed record, but are set out at pages 262–295 and 1077–1141 of the original record on file with this Court.

[13] The appellants state (Br. 56) that the district court refused to let them make offers of proof. Since the judge did not allow the appellants to intervene and there was no taking of testimony, there was no formal offer of proof. The court had before it, both in considering the appellants' intervention motions and in deciding whether to approve the decree, the appellants' long memorandum (Original R. 1077–1141) which sets forth the basis upon which they challenged the proposed amendments.

posal which is now before me is not perfect, it is at least a substantial improvement upon present conditions, it does not foreclose further steps to accomplish and achieve further improvements when they appear to be either necessary or desirable. It permits of further study of the situation" (R. 469). With respect to the two aspects of the amendments that the appellants here principally challenge—the voting procedures and the performance survey—the court stated (R. 469) that the "important changes in voting procedures" that the amendments will require "without doubt * * * will improve the situation"; and that "the proposed survey and logging system is an improvement of what is presently in force and effect." It noted (*ibid.*) that the government "has reserved the right to ask the Court at a later date to require changes of improvements in the survey procedures," that "further improvements should be required if found desirable," and that "[w]e can only find out if they are desirable by testing out these surveys as now proposed and the logging systems as now proposed."

The court was unwilling to act upon the proposed amendments, however, until the ASCAP membership had first voted on it, since various members had indicated opposition (R. 468–469, 471, 478). The court indicated that the vote should be taken on a per capita basis as well as on the weighted basis provided in ASCAP's bylaws (*i.e.*, weighted to reflect the members' varying contributions to ASCAP's revenues). The court directed that the balloting was to be conducted under the supervision of a member of the bar

appointed by the court and that all ballots were to be mailed by this appointee and to be opened and tabulated in open court. There was to be a separate tabulation of writer members and publisher members, and of subclassifications of each group according to the number of their votes; and these classifications and subclassifications were to be tabulated both on a per capita and on a weighted voting basis (R. 456, 478–479, 481, 484, 503–508, 590–602). The government, ASCAP, and the appellants approved the proposal of a vote by the membership (R. 476).

ASCAP agreed to, and did, pay $1,000 of the expense of mailing to its members a circular prepared by those opposed to the proposed consent judgment, and also mailed all letters which individual members wished to have circulated with reference to the vote (R. 603–606). In addition, prior to the balloting, special membership meetings were held on the West Coast and in New York to give ASCAP members further opportunity to discuss the proposed consent judgment (R. 493–496).

The ballots were tabulated in open court on January 6, 1960, by independent auditors designated by the court. Approximately 83 percent of all members eligible to vote had cast ballots (5,354 out of 6,457). On a weighted basis, 83 percent of the votes eligible to be cast were cast in favor of the proposed consent judgment. On a per capita basis, 68 percent of all members who cast ballots voted in favor of it. Also, every one of the eight writer and six publisher subclassifications voted in favor, both on a per capita and on a weighted basis (R. 556–562, 555).

The following day, the court, after hearing those who asked to be heard in opposition to the decree (R. 562–577, 580–583, 588–589), including the appellants' counsel (R. 570–577), delivered an oral opinion which summarized the nature of the changes embodied in the proposed consent judgment and the reasons therefor (R. 662–667). The court, "[a]fter careful consideration * * * of the arguments for and against the approval of this proposed consent judgment," concluded that (R. 666)—

> although not a panacea for all the alleged ills besetting the Society, the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees.

The court accordingly approved the amended consent judgment (R. 667–680).[14]

The appellants' appeal, filed on January 14, 1960, is from the order denying their motion for leave to intervene entered on November 16, 1959 (R. 489, 714).

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[14] Two amendments to the 1960 judgment were made by an order entered by Judge Ryan on November 15, 1960, upon the consent of ASCAP and the government, and after notice and opportunity to be heard *amicus* given to the ASCAP members. One amendment changed the definition of "recognized work" to permit songs that had appeared in the ASCAP survey for less than one year to share in the distribution of the Recognized Works funds (see fn. 9, p. 15–16, *supra*). The other amendment insures that newer writers will have the same "brakes" on any reduction of their revenues under the Recognized Works Fund as they would have on the basis of their recent performance record, had it not been for the "brakes" on any increase in this fund under the old arrangement that prevented them from obtaining such rights.

They did not appeal from the final order, approving the judgment, that was entered on January 7, 1960 (R. 714).

SUMMARY OF ARGUMENT

I

Section 2 of the Expediting Act, 15 U.S.C. 29, under which this appeal was taken, permits appeal from "the final judgment" of the district court in a civil action by the United States under the antitrust laws. In our Motion to Dismiss or Affirm, we urged that the district court's order of November 16, 1959, denying the appellants' motion to intervene as of right, was not "the final judgment" of the district court and therefore was not appealable. Upon further consideration of the matter, we have concluded that the decisions of this Court indicate that district court orders denying intervention as of right in government antitrust cases are appealable if the applicant had the right to intervene; and that whether denial of intervention in a particular case is appealable depends upon whether the applicant had the right to intervene. We, therefore, do not now contend that this Court cannot consider whether the appellants' motion to intervene was improperly denied.

1. Although there is language in some of this Court's earlier opinions which can be read as indicating that under the Expediting Act an appeal may be taken only from the district court's final determination in the case, in *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 20, the Court flatly stated: "If appellant may intervene as of right, the order of the court

denying intervention is appealable." See, also, *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.*, 331 U.S. 519, 524, cited in the *Sutphen* case. In *Sutphen*, the Court explained that it had postponed the determination of the jurisdictional question to the hearing on the merits in order "to resolve [the] question" whether the applicant had the right to intervene. Upon concluding that it did not, the Court dismissed the appeal. See, also, *Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518.

The rationale of these recent cases appears to be that if the applicant had the right to intervene, an order denying such right is appealable; and that the determination of the Court's jurisdiction to entertain the appeal thus turns on the merits of the claimed right to intervene. If there was a right to intervene, the order denying intervention is reversed; if there was no such right, the appeal is dismissed. Since, as we show below, the appellants here did not have the right to intervene, this appeal should be dismissed.

2. If this Court should hold that intervention was improperly denied, a further question arises as to the subsequent proceedings in the district court. Since the appellants have appealed only from the order denying intervention, only that order, and not the unappealed final order approving the amended consent judgment, is before the Court. Thus, if the Court were to reverse the order denying intervention, the appellants would become parties to the antitrust suit. As such, they would have the right under the decree (as modified) to apply to the district court for modifications thereof, including the amendments in

the 1960 decree. But in view of the appellants' failure to seek to appeal from the 1960 decree, and the fact that that decree has been put into operation and ASCAP has made many operating changes in accordance therewith, we do not believe that, if the order denying intervention should be reversed, the 1960 consent judgment should be automatically vacated.

II

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention as of right "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *." The district court properly denied the appellants' motion to intervene as of right, since (1) the appellants' asserted interest in the proposed enforcement of the antitrust laws as related to the internal organization of ASCAP was adequately represented by the government and (2) the appellants are not bound by the judgment approving the modified consent decree with respect to the matters for which they sought intervention.

A. 1. A private party has no right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure in an action brought by the government, on the grounds that the government is not properly conducting the litigation and that the would-be intervenor could more adequately protect the public interest. This is particularly true in the antitrust field where Congress has carefully provided separate paths by which the government and private parties, operating independ-

ently, may move to restrain violations of the law. *United States* v. *Borden Co.*, 347 U.S. 514. Accordingly, private parties have been consistently refused permission to intervene in antitrust cases to vindicate either their private rights or the public interest.

These principles are particularly applicable to efforts to intervene in opposition to proposed consent settlements in antitrust actions. For the government may have good and proper reasons for agreeing to relief in antitrust cases narrower than that sought in the complaint or that other interested persons believe may best serve the public interest. But the policy judgments which necessarily enter into such determinations are neither capable of, nor appropriate for, judicial evaluation. Moreover, the mere admission of a private party may result in blocking any possibility of securing consent either because of the refusal of the intervenor to agree or because his participation may lead a defendant to withdraw its consent.

2. The record fully supports the district court finding that the government's representation of the public interest here was in fact adequate. The amendments to the decree made significant improvements in six important areas in which the 1950 judgment had been deficient. In arguing to the contrary the appellants all but ignore the modifications in the basic distribution formula to give younger and newer authors and publishers a fairer share of the ASCAP revenues; yet the amendment to this section of the decree was described by the district court as "the most significant change in the consent judgment" and "a substantial

improvement over the present methods." Moreover, the appellants are not correct in contending that the amendments fail to make significant improvements over the situation prevailing under the 1950 decree in the two areas on which they do focus their attention. The provisions relating to voting for the Board of Directors cut the maximum voting strength of the allegedly controlling group of publishers from 78 percent to 41 percent, and provisions were adopted guaranteeing any group of members with one-twelfth of the vote the right to name their own board member. Similarly, the modified performance survey makes substantial improvements over the existing system both in providing a more adequate and scientific sampling of actual performances and in insuring that information derived from different sources would be properly weighted to insure that the performance credits assigned to each member will reflect the percentage of ASCAP revenues derived from that source. In short, as the district court found (R. 666), the decree represents a "definite improvement over existing procedures" and "will serve to advance the antitrust purpose of the Government suit".

B. Appellants are seeking to intervene in order to impose additional restrictions upon ASCAP. But nothing in the consent judgment, as approved by the court, bars appellants from securing such further relief in any action it might bring against ASCAP. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19. For the decree does not purport to set a maximum limit upon what ASCAP may do to correct any deficiency in its internal operations, but merely provides certain

minimum standards which it must meet. Since the 1960 decree is thus not *res judicata* of the rights appellants seek to protect through their intervention, they are not "bound" by the judgment within the meaning of Rule 24(a)(2). The 1960 decree does not bar the appellants from maintaining any action they may have under the antitrust laws against ASCAP; the appellants are no more bound here than the government would be bound by a decree obtained by the appellants in a private antitrust action. *United States* v. *Borden Co.*, 347 U.S. 514.

ARGUMENT

I

THE JURISDICTION OF THIS COURT TO ENTERTAIN THE APPEAL

This appeal was taken pursuant to Section 2 of the Expediting Act, 15 U.S.C. 29, which provides for direct appeal to this Court from "the final judgment" of the district court in a civil action brought by the United States under the antitrust laws. In our Motion to Dismiss or Affirm we urged that the district court's order of November 16, 1959, denying the appellants' motion to intervene as of right, was not "the final judgment" of the district court from which an appeal lies to this Court under Section 2 of the Expediting Act; and that "the final judgment" in this proceeding was the district court's order of January 7, 1960, approving the amended consent judgment, from which no appeal was taken. In its order of May 23, 1960, this Court postponed further consideration of the jurisdictional question to the hearing on the merits (R. 719).

Upon further consideration of the jurisdictional question, we have concluded that, while the matter is not free from doubt, the decisions of this Court indicate that district court orders denying intervention sought as of right in government antitrust cases are appealable if the applicant had the right to intervene; and that the determination of this Court's jurisdiction to entertain such appeals depends upon the merits of the particular case, *i.e.*, whether the applicant had the right to intervene. Thus, while we believe, for the reasons set forth below, that the failure of the appellants to appeal from the final judgment approving the modified consent decree affects the relief to which they might be entitled if they prevail on the merits of their appeal, we do not contend that the Court lacks jurisdiction to consider whether their motion to intervene as of right was improperly denied.

1. There is language in *United States* v. *California Co-operative Canneries*, 279 U.S. 553, 558, and *Allen Calculators Co.* v. *National Cash Register Co.*, 322 U.S. 137, 142–143, which can be read to indicate that the Expediting Act, with the objective of preventing the delays consequent upon piece-meal review of questions arising in government antitrust proceedings, precludes any review of district court actions in such proceedings except as part of a review of the final district court adjudication; and that on such review the decree can be attacked "because the appellant had been wrongfully denied intervention" (*Allen Calculators, supra*, 322 U.S. at 142). But in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, this Court did consider, prior to the final district court

adjudication on the merits, the denial of a claimed right to intervene in a government antitrust case, albeit in the special circumstances there prevailing the decree itself provided for such intervention by the company (Panhandle Oil Co.) in whose behalf the intervention was sought.

In *Sutphen Estates, Inc.* v. *United States,* 342 U.S. 19, 20, the latest opinion of the Court dealing with the appealability of an order denying intervention in a government antitrust suit, the Court, after pointing out that the appellant had sought intervention as of right, flatly stated:

> If appellant may intervene as of right, the order of the court denying intervention is appealable.

As authority for this statement, the Court cited *Brotherhood of Railroad Trainmen* v. *Baltimore & O. R. Co.,* 331 U.S. 519, and Section 2 of the Expediting Act. The *Brotherhood* case arose under the Urgent Deficiencies Act, 28 U.S.C. 47a (1946), which permitted appeal to this Court from a "final judgment or decree" of the district court in certain suits under the Interstate Commerce Act. In holding that the Brotherhood had been improperly denied intervention as of right, and that such denial of intervention was appealable, the Court stated (p. 524):

> Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene where intervention is a permissive matter within the discretion of the court. * * * But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying interven-

> tion becomes appealable. * * * And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom. * * *

It is true that in the *Sutphen* case, *supra,* the appeal was in fact taken both from the order denying intervention and from the final judgment of the district court (Record on Appeal, No. 25, O.T., 1951, pp. 119–120, 122), and the jurisdictional issue was neither briefed nor argued. But the opinion's unequivocal statement, and its citation of both the *Brotherhood* case and the Expediting Act, suggest that the Court was indicating that any order improperly denying intervention as of right is appealable.

In the *Sutphen* case, as in the instant case, the Court had postponed the determination of the jurisdictional question to the hearing on the merits. The Court explained that it had done so "to resolve [the] question" whether the applicant had the right to intervene. After concluding that it did not, and also that there was no abuse of discretion in the denial of permissive intervention, the Court dismissed the appeal. See also *Westinghouse Broadcasting Co.* v. *United States,* 364 U.S. 518, where the Court *per curiam* recently dismissed an appeal from an order denying intervention (sought both as of right and on a discretionary basis) by a private party in a government antitrust suit that had been settled by a consent judgment.

The rationale of these recent cases thus appears to be that if the applicant "may intervene as of right, the order of the court denying intervention is appealable" (*Sutphen* case, *supra*); and thus that, in order to determine whether an appeal lies, the Court must examine the merits of the claim for intervention. If the applicant had the right to intervene, the order denying intervention is appealable and must be reversed (*Brotherhood* case, *supra*); if, on the other hand, there was no right to intervene, then the order denying intervention is not appealable, and the appeal is dismissed (*Sutphen* and *Westinghouse* cases, *supra*). In the instant case, accordingly, we agree that it is proper for the Court to consider whether the appellants had the right to intervene. Since as we show in Point II, *infra,* however, they did not have that right, we submit that the appeal should be dismissed.

2. If this Court should hold that intervention was improperly denied, a further question arises as to the subsequent proceedings in the district court. Since the appellants have appealed only from the order denying intervention, only that order, and not the unappealed final order approving the amended consent judgment, is before this Court.

The appellants, relying on the discussion of a similar question in the *Pipe Line* case, *supra,* suggest that if they were to prevail, the district court upon remand might, *sua sponte* or on motion of the government, set aside its order of approval and reconsider the merits of the proposed consent settlement with appellants as parties. But the situation in the *Pipe Line* case is inapposite. It is true, as this Court noted

(312 U.S. at 509), that in the *Pipe Line* case the district court had issued an "opinion", after the denial of intervention but before this Court's decision on the appeal from the intervention order, directing the parties to submit an order embodying the terms of the opinion. But no order had been submitted and no final judgment or decree had been entered. This Court's remand on the intervention point, accordingly, could be considered by the district court in the context of a still pending proceeding.

Here, on the other hand, a final judgment has been entered and the time for appeal therefrom has long since expired. The amended consent judgment has been put into operation, ASCAP has made many operating changes in accordance therewith, and distributions to members have been made on the basis of the new formulae.

If the appellants should prevail on their claim to intervene, this Court's reversal of the order denying intervention would result in their being made parties to the antitrust suit. As parties, they would have the right, under Section XVII of the 1950 decree, "to make application to the court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof" (R. 47). But in view of their failure to take any action to prevent the 1960 modifications from becoming effective, we do not believe they should or would be entitled to have these modifications set aside, except through the procedures

under Section XVII of the decree by which "parties" thereto may seek modifications. Whether ASCAP would be entitled to have the 1960 decree vacated because of the change in circumstances resulting from the appellants' intervention is a question for the district court.

II

THE DISTRICT COURT PROPERLY DENIED THE APPELLANTS' MOTION TO INTERVENE AS OF RIGHT

Although the appellants sought intervention both as of right and on a discretionary basis, they have appealed only from the denial of intervention as of right. Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention as of right

> when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action * * *.

Appellants conceded below (R. 251) that, in order to intervene under this provision, they must establish both that their interests may be inadequately represented by the existing parties and that they may be bound by the judgment. See *Cameron* v. *Harvard College,* 157 F. 2d 993, 996 (C.A. 1); 4 Moore's *Federal Practice,* 2d ed., § 24.08. As we shall show, the appellants satisfy neither requirement.

Preliminarily, however, we point out the unusual character of the intervention here sought. The appellants attempted to intervene to oppose the position taken by the parties to the antitrust suit (the government and ASCAP) that the proposed amendments were an appropriate step toward carrying out

the purpose of the suit by strengthening, in significant respects, the 1950 consent judgment. The appellants do not claim that the amendments, as far as they go, are improper; indeed, they concede that the changes are an improvement over the existing situation. Their sole objection is that the amendments do not go far enough, *i.e.*, that further modifications of the 1950 judgment are required to accomplish the purposes of the suit. They are thus, in effect, seeking to intervene as parties plaintiff on the side of the government—plaintiffs seeking to further the same public interest that the government is protecting, but attempting to go beyond what the government deems appropriate to protect that interest.

The appellants make no claim that the extensive negotiations between the government and ASCAP leading to the amended judgment were not carried out fairly or that the government attempted in any way to favor particular segments of the ASCAP membership at the expense of other segments. They do not charge that the Attorney General and his representatives have not conscientiously performed their duty to enforce the antitrust laws in the way that they believe will best serve the public interest, or that the government misstated the facts when it advised the district court that the proposed amendments made "very substantial strides in * * * diminishing concentration of control" by large members (R. 321), "circumscribe[d] very sharply what the board may do in the area of surveys, distributions and grievance procedures * * *" (R. 323), and represented the "outermost limits" to be obtained by negotiating (R. 321).

What the appellants, in essence, are seeking to do through their attempted intervention, therefore, is to substitute their judgment for that of the Attorney General and the district court as to what the public interest requires in correcting the deficiencies that have developed under the 1950 judgment. Both the government and ASCAP concluded that the amendments made substantial improvements in the competitive situation in the Society by strengthening the position of the newer and smaller members vis-à-vis the older and more powerful ones; every classification of the ASCAP membership voted in favor of the amendments (both on a per capita and on a weighted average basis); the district court, after hearing at length all the objectors to the amendments (including the appellants), concluded that the decree "does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees." (R. 666). The appellants would nevertheless reject the substantial improvement accomplished by the amendments and, in the hope of obtaining somewhat greater relief, throw the matter into what the government described as "very lengthy and very difficult litigation with very uncertain results" (R. 327).

As we shall now show, in these circumstances the appellants failed to establish their right to intervene as of right under Rule 24(a)(2).

A. *The United States Represents the Public Interest in Government Antitrust Cases, and Private Parties Cannot Intervene in Such Cases on the Claim*

That the Government is Inadequately Protecting the Public Interest.

The appellants state, as they did before the district court (R. 254, 256, 257), that in moving to intervene they were not "seeking to further any private litigation with the Society. Rather, they sought to assert adequately the very rights which the government was purportedly enforcing solely on behalf of the ASCAP general membership" (Br. 40). In other words, the appellants sought to intervene to vindicate the public interest in antitrust enforcement. But in so doing they totally misconceived the nature of the intervention as of right provided by Rule 24(a) of the Federal Rules.

We leave to the appellee ASCAP to discuss whether the appellants' interests were adequately represented by the Society. We note, however, that the district court found (R. 666) that

> [t]he proposed judgment has been consented to by the attorneys for ASCAP with the unanimous approval of the Board of Directors as in their judgment accomplishing the best possible results for the Society as a whole and for its individual members. * * *

and that all classes of the ASCAP membership, including necessarily those of which the three appellants are members, voted by a majority to accept the decree. But even assuming *arguendo* that ASCAP has not adequately represented the appellants' interests, the district court nevertheless correctly denied intervention as of right. For the United States, operating through the Antitrust Division of the Department of

Justice, both as a matter of law and as a matter of fact, adequately represented the appellants' interests. Since the appellants sought to intervene on the side of the United States, they had to show that the latter inadequately represented the public interest which they, too, are seeking to vindicate.

1. The basic weakness in the appellants' position is that a private party cannot intervene in a public suit instituted *by the United States* on the claim that, in conducting the litigation, the government is "inadequately" representing the interest of such person. For it is the government, and not private parties, that must determine how government litigation is to be conducted—even though the ultimate result of the litigation will be to benefit the private party or his class. The courts should not, and do not, attempt to evaluate whether the government is handling its cases properly, *i.e.*, whether someone else might conduct the case differently or better, or seek different relief, or settle it on different terms. The government is always permitted to proceed on its own. This is particularly so where intervention is sought not to protect private rights, but to vindicate the public interest that the government is allegedly inadequately protecting in its conduct of the litigation. See *infra*, pp. 43–47. For whether the representation of a prospective intervenor's interest by the parties is "inadequate" within the meaning of Rule 24(a)(2) does not depend upon a subjective evaluation by the court of how well the litigation is being handled, but upon whether "there is proof of collusion between the repre-

sentative and an opposing party, * * * the representative has or represents some interest adverse to that of the petitioner or fails because of nonfeasance in his duty of representation." 4 Moore's *Federal Practice*, 2d ed., § 24.08, pp. 38–39.

Nothing of this nature is charged here. It is not contended that there was anything collusive about the bargaining which took place between the representatives of the Antitrust Division and counsel for ASCAP which led to the proposed decree, nor is there any challenge to the government's statement that the proposed decree represented "the absolutely outermost limits to which ASCAP could be persuaded to retreat by negotiation" (R. 321). This case is unlike *Kaufman* v. *Societe Internationale*, 343 U.S. 156, relied upon by the appellants (Br. 35), where non-enemy minority stockholders sought to intervene as parties plaintiff in a suit *against* the government brought by their corporation, an alien enemy, to recover its property that had been vested under the Trading with the Enemy Act. Intervention was granted because the interest of the stockholders was in basic conflict with that of "the dominant enemy group which had charge of the suit [and who] would not press the corporate claim in a manner that would adequately protect the claims of innocent shareholders * * *." (343 U.S. at 158, see also *id.* at 160–161). Finally, there is here no suggestion of non-feasance, as in *Wolpe* v. *Poretsky*, 144 F. 2d 505 (C.A. D.C.), certiorari denied, 323 U.S. 777 (see App. Br. 36), where property owners, placed "on

an equal footing with the [District of Columbia] Corporation Counsel in the enforcement" of governing orders by the District of Columbia Code (144 F. 2d at 507), were permitted to intervene to appeal from an adverse court determination where the Zoning Commission "in executive session and without public hearing or notice to property owners affected" (*id.* at 506), decided not to appeal.[15]

[15] The other authorities cited by appellants are similarly inapposite. *United States* v. *Reading Co.*, 273 Fed. 848 (E.D. Pa.), modified and affirmed, *sub nom. Continental Insurance Co.* v. *United States*, 259 U.S. 156, and *United States* v. *St. Louis Terminal R.R. Ass'n*, 236 U.S. 194, 199, involved the right to participate *as defendants* in antitrust relief proceedings where the intervenor's interests were distinguishable from those of the original defendant. *California Co-op. Canneries* v. *United States*, 299 Fed. 908, 912–913, to the extent it involved intervention as of right rather than as a matter of discretion, rests on the court of appeals' conclusion that Rule 15 of the Supreme Court of the District of Columbia gave a right of intervention, "broader" than that provided by the federal equity rule then governing intervention, to "any one claiming an interest in the litigation" (299 Fed. at 912). See *United States* v. *California Canneries*, 279 U.S. 553, 556–557 (suggesting that the court of appeals' determination may have been in error). And in *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765 (C.A. D.C.), where a union and an employer in a high wage area were permitted to intervene *as defendants* in support of an order of the Secretary of Labor under the Walsh-Healey Act, the court's holding was that appellants were "entitled to intervene under the terms of 24(b)" (permissive intervention) (226 F. 2d at 769, 770). While the court also found no barrier to intervention under Rule 24(a) in the fact that the Secretary was espousing the same position in the litigation, it did so not on the basis that his representation was inadequate, but rather that in the particular administrative law situation presented by that case "the precise bounds of Rule 24's provisions do not necessarily bar intervention if there is a sound reason to allow it." (*id.*

2. What is true as to intervention in government litigation generally has particular relevance in the antitrust field, where the very nature of the problem demands that the "United States * * * must alone speak for the public interest * * *." *Buckeye Coal & Ry. Co.* v. *Hocking Valley Ry. Co.*, 269 U.S. 42, 49. Congress has not been unmindful of the role that private persons, motivated by the protection of their own economic interests, can play in antitrust enforcement. To this end it has provided private antitrust actions for treble damages (Section 4 of the Clayton Act, 15 U.S.C. 15) and for injunctive relief (Section 16 of the Clayton Act, 15 U.S.C. 26), and has given private suitors the right to use a judgment in a government suit as prima facie evidence of the violations there adjudged (Section 5 of the Clayton Act, 15 U.S.C. 16). But the two types of proceeding—public and private—were purposely kept separate and distinct so that the public interest of the government would not be impeded by the special interests of the private litigant. As this Court stated in *United States* v. *Borden Co.*, 347 U.S. 514, 518:

> The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws, but it is the Attorney General and the United States district attorneys who are pri-

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at 768). The case in other words involved no more than an equitable application of a frequent statutory feature of judicial review of agency action under which interested parties are afforded a right to intervene in support of the validity of an agency order under attack (see *e.g.*, 47 U.S.C. 402(e); 5 U.S.C. 1038). But we are aware of no statute providing a right to intervene in support of enforcement proceedings such as are here involved.

> marily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. * * * "* * * [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other." *United States* v. *Bendix Home Appliances,* 10 F.R.D. 73, 77 (S.D. N.Y.) (1949).[16]

In accordance with these principles, the courts have consistently denied intervention in government antitrust cases. Thus, in *United States* v. *Bendix Home Appliances,* 10 F.R.D. 73 (S.D. N.Y.), the court denied discretionary intervention as parties plaintiff, sought to enable the intervenors to enforce a consent judgment entered in a government antitrust action.

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[16] In the early case of *United States* v. *Northern Securities Co.*, 128 Fed. 808, 812 (C.C.S.D. Minn.), the court, in denying intervention as to the relief to be granted by the judgment in a government antitrust action, said:

> It [the United States] is the conservator of the public welfare, and has a right to speak for the public. According to well-established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as amici curiae, so long as the government is present by its attorney general and expresses its disapproval of such intrusion. This would be wresting from the government that control over the litigation, so far as the public is concerned, which it has a right to exercise.

The court, per Judge Rifkind, said (10 F.R.D. at 76):

> It would seem to be a necessary corollary of this dichotomy of rights which underlies the structure of the anti-trust laws that private persons may not intervene in suits which are maintainable only by the United States. And this corollary should apply whether the particular action is for enforcement of the anti-trust laws, or for the enforcement of decrees rendered under those laws.

The court further said (*id.* 77):

> The very fact that the Congress has made an adjudication in a Government suit prima facie evidence of certain facts in a private suit would indicate that it was not the intention of the Congress that private parties should be permitted to apply for private relief at the foot of a decree entered in a Government suit. 15 U.S.C. § 16. * * * Intervention, if allowed here, would tend to defeat the policy behind the distinction drawn by section 16 between litigated decrees and consent decrees.

In *United States* v. *Bearing Distributors Co.*, 18 F.R.D. 228 (W.D. Mo.), the court similarly denied intervention that was sought in order to secure enforcement of a consent judgment entered in a government antitrust action. The court, per Mr. Justice Whittaker (then a district judge), observed that the applicant's purpose was to "assume prerogatives of the Attorney General," and that in the action "instituted by the Government for public protection" the United States represented the applicant's interest (18 F.R.D. at 231).

In the instant case, three prior applications for intervention have been denied. Unreported order en-

tered January 25, 1949 (Civ. 13-95, S.D. N.Y.); *United States* v. *ASCAP*, 11 F.R.D. 511 (1951); *United States* v. *ASCAP*, 1956 Trade Cases, par. 68, 524 (S.D. N.Y.). In the 1951 ruling, the court said (11 F.R.D. at 513):

> The protection of the public interest rests upon those officials whose special responsibility and duty it is to enforce the laws. To permit intervention by private citizens, whose purpose in the main is self interest, in proceedings instituted by the Government is more likely to hinder rather than help in the enforcement of laws.

In numerous other cases, intervention for the purpose of modifying, implementing or enforcing the relief against defendants in government civil antitrust actions has been denied.[17] Indeed, we are aware of no case in which, over the opposition of the United States, intervention was allowed under Rule 24(a) or its predecessors as a matter of right.[18]

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[17] *United States* v. *Radio Corporation of America*, 3 F. Supp. 23 (D. Del.); *United States* v. *General Electric Co.*, 95 F. Supp. 165 (D. N.J.); *United States* v. *Loew's, Inc.*, 186 F. Supp. 13 (S.D. N.Y.); *United States* v. *Paramount Pictures*, 334 U.S. 131, 176-178. See *United States* v. *Radio Corporation of America*, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518.

[18] We do not regard *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502, as an exception, since there intervention was granted pursuant to an express right of intervention given by the court's earlier judgment and was in "vindication of the decree" (312 U.S. at 508). See *supra*, pp. 31-32.

The appellants attempt to distinguish these cases on the ground that there the prospective intervenors were attempting to vindicate a private interest, whereas here they purport to represent the public interest. But the policy underlying the consistent rejection of attempts by private persons to intervene as plaintiffs in government antitrust suits are even stronger where the intervenor's objective is primarily to substitute its views for those of the government as to how the public interest can best be served, rather than to promote its own private interests. For the issue of how effectively the government is furthering the public interest by the manner in which it is conducting a particular antitrust case is, by its very nature, not susceptible of judicial evaluation and determination. It rests on so many intangible factors as to preclude the kind of judicial scrutiny that Rule 24(a)(2) requires as a basis for the determination whether the representation of the applicant's interest by the parties is "inadequate." In other words, the "interest" of the applicant that may be protected by intervention under Rule 24(a) is his personal or pecuniary interest, and not his interest in purporting to speak for the public interest represented by the government. Certainly, private individuals and companies cannot be permitted to intervene in public antitrust suits brought to trial, or to have a directory role in the conduct by the government of the trial. That would, indeed, be an extraordinarily novel and disturbing practice.

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3. The same considerations apply with respect to efforts to intervene in opposition to proposed antitrust consent judgments. Sometimes the government is willing to settle an antitrust case for relief that is somewhat narrower than that requested in the complaint, or that certain of the interested parties may believe would best serve the public interest. But that fact alone does not render the government's representation of the public interest inadequate. On the contrary, a favorable settlement frequently is more in the public interest than litigating a case to judgment in the hope of obtaining somewhat broader relief. Weaknesses in the legal theory or deficiencies in the proof may reasonably indicate to the government that a settlement providing a substantial measure of immediate relief is preferable to protracted litigation to an uncertain outcome. Moreover, the government may have doubts whether, even if all its legal theories were accepted and it fully proved its case, the court would grant the full measure of relief requested. These factors—and the many others upon which the government's decision whether to accept a proposed consent judgment rests—are obviously neither capable of, nor appropriate for, judicial evaluation. They are, therefore, not proper bases for determining whether the alleged "inadequacy" of the settlement in protecting the public interest renders the government's representation of such interest so "inadequate" as to warrant intervention by private parties allegedly seeking to protect that same interest. But under the appellants' theory of intervention, that

is precisely the kind of inquiry that the courts would be compelled to undertake in passing on intervention applications.

Other equally serious problems are involved where private parties attempt to intervene to block a consent decree. Their mere admission as a party may enable them to prevent acceptance of the proposed decree, regardless of the views of the other parties or of the court. Thus, once they become parties to the case, they presumably also are necessary parties to a consent settlement. Furthermore, as parties they may have the right to introduce evidence, and if they insist on that right, the defendants are unlikely to enter into a consent decree. For Section 5 of the Clayton Act (15 U.S.C. 16), which makes decrees in government antitrust suits prima facie evidence in a private suit of the violations determined in the government case, is inapplicable "to consent judgments or decrees entered before any testimony has been taken." Here, ASCAP stated that, if evidence were introduced, it would withdraw its consent to the judgment (R. 371). Permitting intervention in opposition to consent decrees would, therefore, as a practical matter, seriously interfere with the consent judgment program which plays a major role in antitrust enforcement.

This problem is not solved by appellants' contention (Br. 64–68) that, even if they could thus block a consent settlement here, the government would still be able to seek a litigated modification of the decree under the powers reserved to it by Article XVI of the 1950 judgment (R. 47) or general equitable

principles.[19] For at a minimum the appellants' position means that, regardless of the public interest in settling the case promptly on favorable terms, the private intervenor may, by fiat, block any immediate improvement in the situation.

4. The record fully supports the district court's finding that the "representation of the public and the [appellants] was adequate and in the public interest" (R. 489). As set forth in the Statement (*supra*, pp. 10–19), the amendments made significant improvements in six important areas in which the 1950 judgment had proven deficient. We submit that the activities of the Department of Justice in achieving these substantial improvements fully and capably represented the public interest for which the appellants were purporting to speak.

The appellants challenge the adequacy of the government's representation of their interest primarily on the ground that in two of the six aspects in which the 1950 judgment was changed—the voting provisions and the procedures adopted for insuring a fairer survey of the performances of members' compositions—the amended decree fails to protect the smaller publishers as against the larger ones (see App. Br. 41–55). We show below that the appellants' characterization of the amended decree as "wholly inadequate either to eliminate the control by the dominating publishers of the voting and the affairs of the Society, or to secure protection for the ASCAP general membership from the anticompeti-

[19] But see *United States* v. *Swift & Co.*, 286 U.S. 106.

tive activities of these publishers" (Br. 17; see Br. 40) is incorrect. But a more basic flaw in the appellants' position is their failure to recognize that the adequacy of the decree in accomplishing the purposes of the antitrust suit cannot be measured merely by the two particular provisions they attack, but requires consideration of the decree as a whole. Thus viewed, we think that, as the district court stated (R. 666), "the decree does represent definite improvement over existing procedures and that it will serve to advance the antitrust purposes of the Government suit and of the prior decrees."

In attacking the adequacy of the decree, the appellants pay little or no attention to what the district court characterized as "the most significant change in the consent judgment" (R. 664), namely, the modification in the basic distribution formula to give the younger and newer authors and publishers a fairer share of the ASCAP revenues, largely at the expense of the so-called "controlling group." These modifications, including the option afforded members to receive all of their revenues upon the basis of current performances, the scaling down of the weight given to seniority under the alternative "multiple fund" plans, and the adoption of detailed "weighting rules" significantly limiting the discretion of the Board in assigning credit values to different types of performances (R. 664–665, 670–674, 680–714), were correctly described by the district court as "a substantial improvement over the present methods" (R. 664).

Nor can the appellants' efforts to minimize the significance of the substantial improvements in voting

procedures and in the performance surveys withstand analysis. It is quite true that the ASCAP internal organization has not been "democratized" to the extent proposed by the appellants.[20] But that fact does not establish that the betterments in the voting system were so insubstantial as to require rejection of the amended judgment. The maximum voting strength of the top ten publishers and their affiliates was cut from 63 percent to 41 percent (R. 219, 375), the maximum number of votes of any one member was limited, the basis of voting was changed from income receipt to current performance of compositions (thus favoring the newer members over the older ones), and provisions were adopted guaranteeing any group of members casting one-twelfth of the vote the right to name their own representative as a member of the Board of Directors. Plainly, these are not insignificant or minimal improvements in the voting system. It is no answer to these important changes to say, as the appellants do, that the percentage of votes cast by

[20] The government told the district court (R. 321–322) that, as its negotiations with ASCAP progressed, it concluded that it "wouldn't be appropriate or fair to go any further" in changing the voting rights of the members, such as to give "one vote for each member." Government counsel stated (*ibid.*) that "there is very much substance to ASCAP's argument that those who over the years have done the most for ASCAP are entitled to be recognized as its elder statesman," since "[w]hen ASCAP goes around selling its catalog, most music users are attracted primarily because it contains the works of Hammerstein and Berlin and Kern and Gershwin and its other great writers"; and that "to give every member an equal vote * * * would deliver the control of ASCAP into the hands of hundreds or thousands of very small members, many of whom I have heard characterized as amateur songwriters."

the larger publishers may be increased as a result of disinterest upon the part of the group for which appellants purport to speak, or that the members of this same group (which even under the appellants' calculations will cast about half the votes) are so antagonistic to one another that there is no real chance for any utilization of the provision permitting one-twelfth of the membership to name a director. For if these are the facts, they are the result not of any deficiencies in the decree, but of the character of the ASCAP membership and the various conflicting pressures and interests among the members. Moreover, the claim that the members will be unable effectively to utilize the procedure by which one-twelfth of the membership can select its own director is refuted by the fact that, at the last annual election, two members of the Board were selected by this process (App. Br., n. 30, pp. 47–48).

Similarly, the fact that the operation of the new survey, prepared by outside consultants and supervised by an "independent and impartial adviser * * *" appointed by the district court (R. 664),[21] will continue to be under the direction of the ASCAP Board, does not mean that no substantial improvement in the existing situation can be expected. There are, of course, real mechanical difficulties in extrapolating performance information from a sampling of local

[21] Although the district court appointed two advisers, only one of them (former State Supreme Court Justice McGeehan) is serving. The decree provides only for the appointment of an "independent and qualified person or firm" (R. 668).

radio station operations, and admittedly the significantly increased sampling, backed by station logs, may nevertheless prove to be inadequate. That is why an 18-months' trial period of the new system was provided. But the appellants overlook the extremely important fact that the modified decree, to help the "smaller members" who allegedly secure a high proportion of their performances on local programs, requires a radical revision of the existing system so as to insure that this source of performance credits is given a weighting in deriving overall performance figures equal to the high percentage of ASCAP's revenues for which they are actually responsible (see R. 669). In addition, the independent supervisor of the survey is to make periodic examinations of its "design and conduct" and "estimates of the accuracy of the samples," and to report thereon to the court and the parties (R. 661–662); and after 18 months the United States is authorized to "seek additional relief in respect to * * * the scope, size or accuracy of the survey" (R. 669). If the survey actually turns out to have the deficiencies that the appellants fear, that fact should soon become known and the government will shortly be able to seek further relief to correct the defects.

The short of the matter is that the decree as a whole provides substantial and significant improvements in the 1950 judgment, and goes a long way toward correcting the deficiencies thereunder. Indeed, even in the two principal areas which the appellants single out for

their major criticism, the improvements are far-reaching and important, and plainly in the public interest. Of course, a decree such as this, entered on consent after the parties have engaged in protracted bargaining which necessarily involved considerable give and take on both sides, may not achieve as much as a decree entered in a litigated case in which the government has won a complete victory. But that is no basis for concluding that the relief obtained here is so deficient that the government's representation of the public interest must be deemed ~~adequate~~ inadequate. And, of course, the determination that the public interest will be served by settling the case for something less than might be obtained through litigation is, necessarily, a matter within the discretion of the Attorney General, not subject to judicial scrutiny and re-evaluation.

Judge Ryan, who had become familiar with the problems of ASCAP as a result of ten years' experience in administering the 1950 judgment, recognized that the 1960 judgment is "not a panacea for all the alleged ills besetting the Society" (R. 666). Obviously, no decree entered on consent could solve all of ASCAP's problems or satisfy all of its members. But this decree, which the government believed represented the "absolutely outermost limits" that could be achieved through negotiation (R. 321), does, as Judge Ryan held (R. 666), "represent definite improvement over existing procedures and * * * will serve to advance the antitrust purposes of the Government suit and of the prior decrees."

B. *The Appellants Are Not Bound by the 1960 Judgment so as to Preclude Them From Obtaining Further Relief Against ASCAP With Respect to the Areas in Which They Claim the Judgment is Inadequate.*

The district court's denial of intervention may alternatively be sustained on the ground that the appellants also failed to satisfy the second condition for intervention as of right under Rule 24(a)(2), namely, that "the applicant is or may be bound by a judgment in the action."

1. The 1960 judgment, like the early 1941 and 1950 judgments (R. 27, 35), was entered "without * * * adjudication of any issue of fact or law herein and without admission by any party in respect of any such issue" (R. 667). Since the 1960 judgment did not adjudicate any of the factual or legal questions involved in the antitrust suit, the only way in which the appellants are or may be bound by that judgment is to the extent that, as members of ASCAP, the judgment might bar them from obtaining relief against ASCAP. Whether a judgment "binds" an applicant for intervention in this sense must be determined, of course, on the basis of the particular claims or defenses that the applicant actually sought to assert through intervention.

The appellants did not seek intervention to oppose the amendments to the judgment as too severe, or to assert that ASCAP was not vigorous enough in opposing the government's demands for modifications.

Had that been the case, the appellants might well have been bound by provisions that went beyond what they deemed proper. Here, however, intervention was sought because of the appellants' belief that the judgment did not go far enough in protecting the interests of the smaller members of ASCAP vis-à-vis the controlling group, and that more stringent requirements were necessary (App. Br. 13, 41–55).

The amended decree, however, does not bar the judicial imposition of additional requirements or restrictions upon ASCAP in any action that the appellants might bring against it. See *Sutphen Estates, Inc.* v. *United States,* 342 U.S. 19; *Credit Commutation Co.* v. *United States,* 177 U.S. 311. The decree does not purport to set *maximum* limits on what ASCAP may do to correct any deficiencies in its internal operations and in the relationships among its members. It merely specifies certain *minimum* standards that ASCAP must meet.

For example, in the two areas where the appellants principally object to the amended decree—voting and the survey—the judgment plainly imposes minimum rather than maximum standards. Thus, Section IV of the 1960 judgment (R. 674–676) specifies various procedures that ASCAP is to follow in carrying out the provisions of the 1950 judgment (R. 45) which, in rather general terms, govern the election of directors. The 1960 judgment does not, however, preclude the adoption of further changes in voting designed to carry out the stated purpose of

the voting provisions of the 1950 judgment of "insur[ing] a democratic administration of the affairs of defendant ASCAP" (R. 45).[22]

Similarly, the survey provisions (R. 668–670) of the 1960 judgment merely direct ASCAP to conduct "a census and/or scientific sample of the performances of compositions of its members * * * [to] be made in accordance with the design made and periodically reviewed by an independent and qualified person or firm" (R. 668), and specify certain standards that ASCAP is to follow in conducting such survey and in calculating the members' respective distributions (R. 668–669). Moreover, the judgment expressly provides that, after 18 months of operating experience, the government "may seek additional relief in respect to * * * the scope, size or accuracy of the survey" (R. 669). Plainly it does not bar any changes or improvements in the conduct of the survey that may be deemed appropriate.

In short, the 1960 decree "is not *res judicata* of the rights sought to be protected through intervention"

[22] The only possible exception to this is with respect to the appellants' suggestion, during the hearing before the district court, that one appropriate substitute for the allegedly inadequate voting procedure authorized by the decree would be to have four directors elected by the large publishers, four by the medium-sized publishers, and four by the smaller publishers (R. 376). While the decree does not require ASCAP to weight its votes, if it chooses to do so it must, in the absence of a further court order, operate in the manner prescribed. But the appellants' suggestion for establishing three classes of publishers, each of which would elect four members, does not appear to require any weighting. Moreover, the appellants do not seem to object to the weighting provisions required by the decree insofar as they would apply within any of the three groups of publishers that they propose.

(*Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 21). The appellants are accordingly not "bound" by the judgment within the meaning of Rule 24(a)(2). See 4 Moore's *Federal Practice*, 2d ed., § 24.08.[23]

2. The decree does not purport to, and does not, bar private suitors from maintaining an antitrust action against ASCAP. A decree in a private antitrust suit does not bar the government from maintaining its suit, and by the same reasoning a decree in a government suit does not bar a private action. See *United States* v. *Borden Co.*, 347 U.S. 514. There, in rejecting the argument that an injunction obtained in a private antitrust suit bars the government from obtaining an injunction in its suit against the same practices, the Court pointed out (p. 518) that "[t]hese private and public actions were designed to be cumulative, not mutually exclusive. * * * 'Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' "

This view is supported by the history of Section 5 of the Clayton Act, which makes adjudications of liability in civil or criminal antitrust actions brought by the government *prima facie* evidence of liability in a subsequent private action under Section 4 or Section 16 of the Clayton Act. At the time the section

[23] The fact that a party is directly affected by a decree, which is not *res judicata* in any action he might subsequently bring, does not warrant intervention as of right, since "the protection afforded by intervention of right is not essential to one who will have another legal remedy available after judgment." *United States* v. *Wilhelm Reich Foundation*, 17 F.R.D. 96, 101 (D. Me.), affirmed *sub nom. Baker* v. *United States*, 221 F. 2d 957 (C.A. 1), certiorari denied, 350 U.S. 842.

was under discussion in the Congress, it was recognized that a judgment in favor of a defendant in a government antitrust action would not bar an injured private party from subsequently bringing his own action. Consideration was given to making such a judgment *prima facie* evidence in a subsequent private suit that the defendant had not violated the law. See, *e.g.*, 51 Cong. Rec. 13854–13855. The Congress refused to adopt this proposal, however, because it believed that this would deprive the private citizen of his day in court (*ibid.*). We believe it clear that if a private action is not foreclosed where the government has litigated but lost, it cannot be foreclosed because the government has entered into a consent decree with the defendant. For if the appellants have any valid claim against ASCAP under the antitrust laws, that claim cannot be destroyed by ASCAP's acceptance of a consent judgment in the government suit.

It may be, as the district court appeared to believe (R. 295), that appellants are estopped from bringing an action against the ASCAP Board or its controlling members because of their voluntary participation in the Society as members.[24] Furthermore, they may be unable to prevail in such an action because they cannot show that they were injured by the allegedly re-

[24] Apparently, the appellants do not believe this is the case, since one of the group, Pleasant Music Publishing Corp., has brought a state court action (*Lengsfelder et al.* v. *Cunningham*, Index No. 13344–1957 (Sup. Ct. N.Y. County)) seeking to outlaw the ASCAP weighted rating system.

strictive practices still continuing. But these are circumstances which would exist wholly apart from the decree, and afford no basis in themselves for the claim that the appellants are bound by the decree. Similarly, it is irrelevant to the question whether they are bound by the decree that the decree might, in the absence of such further litigation by them, control their relations with the other ASCAP members as part of the modified "constitution" of the Society.

CONCLUSION

Since the appellants had no right to intervene, this appeal from the order denying intervention should be dismissed.

Respectfully submitted.

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